No. 10654

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PUGET SOUND POWER AND LIGHT COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law are found at R. 32–37.

JURISDICTION

This is an appeal from a portion of a condemnation judgment entered September 2, 1943 (R. 38–40). Notice of appeal was filed November 13, 1943 (R. 41–42). The jurisdiction of the district court was invoked under the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. secs. 258 (a) to 258 (e);

the Lanham Act of October 14, 1940, 54 Stat. 1125, as amended; and the Appropriation Act of May 24, 1941, 55 Stat. 197. The jurisdiction of this Court is invoked under section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the United States, when it condemns the fee title to land traversed by a public road on which Puget Sound Electric Light and Power Company maintained an electric transmission line pursuant to a county franchise, is liable for the $408.98 expended by the company in relocating its lines so that it could continue to serve a customer located outside of the area condemned.

STATEMENT

The United States on June 16, 1942, instituted condemnation proceedings, accompanied by declaration of taking, to acquire certain lands in Renton, King County, Washington, to provide housing for persons engaged in national defense activities (R. 2–19). The interest thus taken was "the full fee simple title" (R. 5, 12, 13, 16, 23), including certain streets and county roads described as follows: "Public Streets: All those portions of * * * Bile Street * * * within the area of the project site" (R. 19).

Because of these condemnation proceedings the Puget Sound Power and Light Company removed its poles and lines from the privately owned lands, and from the streets and roads within the area condemned. It rebuilt elsewhere a line which it had previously operated on Bile Street so as to continue serving a

former customer located outside of the project area (R. 34, 36; Exhibit A, R. 30). The company asserted in its answer that "the property and franchise rights of this respondent will be interfered with and taken or damaged and by reason of the taking thereof its remaining electric public utility system will suffer damage; nothing has been paid to this respondent on account thereof or deposited in the registry of this court as compensation therefor" (R. 25–26). The amount and nature of these claims were more specifically set forth in a stipulation signed by the parties and filed in court on June 30, 1943 (R. 27–29), wherein the claims were itemized as follows:

> (a) Cost to remove distribution line located on privately-owned land and operated pursuant to written easement granted by the owners, $73.00.
>
> (b) Cost to remove distribution lines located at date of commencement of condemnation proceedings upon privately-owned land without written easements, but with the consent, either tacit or oral, of the owners, $268.00.
>
> (c) Cost of removing a distribution line presently (at date of commencement of condemnation proceedings) operated on Bile Street pursuant to franchise granted by the County Commissioners of King County, Washington, $156.99.
>
> (d) Cost to rebuild new line in new location outside of condemnation area to continue service to customer located without the project area, $408.98.

The Government conceded that the company could recover for item (a)—the cost of removing transmission lines located on privately owned land pursuant

to a written easement (R. 28, 35). It contended that the other three items were not compensable. The trial court agreed that items (b) and (c)—the cost of removing lines maintained across privately owned lands under a tacit or oral license and along streets and highways pursuant to a franchise—were not recoverable (R. 36). It held the Government liable, however, for item (d)—the $408.98 expended by the company in rebuilding a new line outside of the area condemned so that it could continue to serve a customer previously served by the line maintained on Bile Street pursuant to the company's franchise from the county (R. 34, 35; Exhibit A, R. 30).

The question thus decided being one which is constantly recurring, the present appeal was taken (R. 41) so that an authoritative decision could be obtained.

SPECIFICATIONS OF ERROR

1. The district court erred in rendering that part of the judgment which awarded to the Puget Sound Power and Light Company recovery against the United States in the sum of Four Hundred Eight and 98/100 Dollars ($408.98) together with interest thereon at the rate of six per cent per annum from January 22, 1943, until paid into the registry of the court.

2. The district court erred in holding that as to the cost to rebuild new line in new location outside the condemnation area to continue service to a customer located outside the condemnation area the Puget Sound Power and Light Company was entitled to recover from the United States, whether such recovery be rested upon grounds of taking of property, taking

of franchise, relocation damages, loss of franchise, severance damages or on the provision of the constitution of the State of Washington (Art. 1, sec. 16) here inapplicable which requires compensation for property "taken or damaged."

ARGUMENT

The Puget Sound Power and Light Company maintained transmission lines and poles within the area condemned under three types of authority—in one instance across privately owned land by virtue of a written easement granted by the owner; in other instances across privately owned land by virtue of the tacit or oral consent of the landowners; and in a third instance along Bile Street by virtue of a franchise granted by King County (R. 28, 33, 34–36; Exhibit A, R. 30).

Where the company had a written easement, an actual interest in land, it was of course entitled to compensation for the value of the interest taken. Accordingly, recovery was had for item (a) (R. 29, 35). Whether the value of that interest was properly arrived at on the basis of the cost of removing existing transmission lines and poles is quite debatable but that issue is not involved here.

In those instances where the company maintained transmission lines across privately owned lands with only the tacit or oral consent of the landowners, it had no interest in the lands taken and was accordingly not entitled to any compensation for costs incurred in removing the poles and lines from the lands condemned (*Potomac Electric Power Co.* v.

United States, 85 F. 2d 243 (App. D. C. 1936), certiorari denied 299 U. S. 565).

In the third situation the court held, and we think quite properly, that the company was not entitled to recover expenditures incurred in removing lines and poles maintained along a public street pursuant to the franchise granted by King County—item (c) (R. 36). It did, however, hold, and we think erroneously, that the company was entitled to recover expenditures (item d) incurred in "rebuilding a new electric power distribution line outside of the area condemned to continue service to a customer located outside the area condemned, *said respondent having formerly served said customer by its electric power distribution line operated in a public street under franchise*" (R. 36; cf. R. 34). Thus it will be seen, and the fact should be carefully noted, that the relocation expenditures which were incurred by appellee resulted from the taking of Bile Street and not from the taking of appellee's written easement across privately owned lands. In other words, the customer in question was formerly served by the line operated along Bile Street and not by the transmission line across private property, a fact made clear by the court's findings and conclusion and by Exhibit A (R. 34, 36, 30). If the customer had been formerly served by the line maintained across privately owned land under a written easement, it is arguable that the value of that easement would have been determined on the basis of what it cost the company to provide a substitute easement (*United States* v. *Wheeler Township,* 66 F. 2d 977 (C. C. A. 8, 1933)).

But in the instant case, as the court's findings make plain, the expenditures were incurred because of the closing of Bile Street and the termination of the company's right to maintain its lines along that street. Such expenditures are not recoverable: (1) Because the franchise from King County did not confer on the appellee any property rights in Bile Street; and (2) because consequential damages including losses resulting from the frustration of private contracts are not compensable under the Fifth Amendment.

I

The franchise from King County did not confer on the appellee any property rights in Bile Street

Though the exact terms in which it is described in judicial opinions may vary, it is well settled that a utility company's franchise to maintain its structures and conduct its operations in the public highway is not an interest in land. It is merely a privilege of sharing in the use of a public highway easement; it is not a grant of a property interest in any particular portion of the highway. Such a franchise is merely "a *license* * * * to share in a public easement." 1 Nichols, *Eminent Domain* (2d ed. 1917), sec. 127. It "is in its nature but a *permit* to use the streets of the municipality in a particular way for a particular purpose" (*Wood* v. *City of Seattle,* 23 Wash. 1, 62 Pac. 135, 140 (1900); see *Washington Water Power Co.* v. *Rooney,* 3 Wash. 2d 642, 101 P. 2d 580, 583 (1940)). It has been described as a "mere *privilege* * * * to occupy a street along with other

travelers * * *'' (*In re City of Seattle,* 49 Wash. 109, 94 Pac. 1075, 1079 (1908)). "The rights in the streets which are so exercised or enjoyed are *not private rights of property,* but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street or where property is carried through it'' (*New England Tel. & Tel. Co.* v. *Boston Terminal Co.,* 182 Mass. 397, 65 N. E. 835, 836 (1903)).[1] Even in a jurisdiction where the fee title to the streets is in the public,[2] it has been held that a franchise or permit to a power company "to lay their conduits, cables, and wires conveyed no estate in the streets and alleys. The permission granted amounted to a mere license, revocable at will,[3] to use

[1] Somewhat similarly, a contract by one railroad company granting to another railroad company in exchange for certain money payments the right to share the use of its railroad tracks by operating trains theron, the owning railroad company remaining in control of the tracks and responsible for their upkeep, has been held neither to create any estate or interest in the railroad right-of-way nor to confer any right to share in the distribution of proceeds of condemnation of a flowage easement over a portion of its length (*Chicago, M. St. P. & P. R. Co.* v. *Chicago, R. I. & P. Ry Co.*, 138 F. 2d. 268 (1943), certiorari denied January 10, 1944).

[2] In the state of Washington, as in most states, the public has only an easement of use in a public street or highway, the underlying fee being in the abutting owners (*Bradley* v. *Spokane & I. E. R. Ry.*, 79 Wash. 955, 140 Pac. 688, 689 (1914)).

[3] The Washington Constitution forbids the granting of an irrevocable or exclusive franchise to a private utility. Wash. Const., Art. I, secs. 8 and 12; Art. 12, sec. 1. Even in the case of an irrevocable franchise to a gas company, the Supreme Court has said that the "company did not acquire any specific location in the streets; it was content with the general right to use them and when

the streets and alleys for certain purposes" (*Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243, 248 (App. D. C. 1936), certiorari denied 299 U. S. 565).

The provisions of statutes or ordinances granting a franchise to share in the use of a public highway, it has been cogently explained, "are merely provisions for the regulation of the different public rights in the streets. *None of them purports to convey private rights of property*" (*New Eng. Tel. & Tel. Co. of Mass.* v. *Boston Terminal Co.,* 182 Mass. 397, 461, 65 N. E. 835, 836 (1913)).

Such a franchise to share in the use of a public highway easement thus is roughly comparable not to an easement in a highway but to a license or permit to peddle goods on the city streets or to operate a truck on a public highway. "Any member of the public conveying his products to his customers had the same right to use the alley that appellant utility company had * * *. No doubt other users of the alley found it convenient to use the alley and suffered some inconvenience by having to convey their commodities by some other route and no doubt appellant suffered some inconveniences by having to convey its commodity by some other route, and for that purpose to remove its apparatus and install it elsewhere. But for such damages the public users, including appellant, may not recover. Appellant imposed no additional

it located its pipes it was at the risk that they might be at some future time disturbed when the State might require for a necessary public use that changes in the location be made" (*New Orleans Gas Light Co.* v. *Drainage Com. of New Orleans*, 197 U. S. 453, 461 (1905)).

burden upon the fee,[4] paid nothing for its privileges, and certainly should not be entitled to recover for the loss thereof by reason of the vacation of the alley" (*Northern Indiana Gas & Elec. Co.* v. *Merchants Imp. Assn.,* 87 Ind. App. 74, 160 N. E. 50, 32 (1928)).

Thus a franchise without more confers on a utility company no property rights in the street itself. It follows, therefore, that when the United States condemned the absolute fee in Bile Street—the county's highway easement and the underlying fee held by the abutting landowners—it did not take any land or interest in land belonging to the appellee. The company's poles and transmission lines were not taken. Under Washington law they continued to be regarded as personalty and had to be removed by the licensee at his own expense (*Dunsmuir* v. *Pt. Angeles Gas, Water El. Lt. & R. Co.*, 24 Wash. 104, 63 Pac. 1095 (1901); *Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243 (App. D. C. 1936), certiorari denied 299

[4] Under the line of authority followed in the state of Washington it is well settled that a franchise to maintain an electric transmission line in a public highway involves no added burden to the highway easement for which abutting property owners are entitled to compensation (*McCullough* v. *Interstate Power & Light Co.*, 163 Wash. 147, 300 Pac. 165 (1931) (electric power line); *Brandt* v. *Spokane & Inland Empire R. Co.*, 78 Wash. 214, 138 Pac. 871 (1914) (power line to service electric powered street railway); cf. *New England Tel. & Tel. Co. of Mass.* v. *Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835 (1913) (dictum); *Cater* v. *Northwestern Tel. Exch. Co.*, 60 Minn. 593, 63 N. W. 111 (1895) (telephone line); *Lay* v. *State Rural Electrification Authority*, 182 S. C. 32, 188 S. E. 368 (1936) (electric power line); *Frazier* v. *East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S. W. 620 (1906) (telephone line)).

U. S. 565). The court below so held, disallowing item (c) (R. 34, 36) from which no appeal has been taken. Thus, it will be seen that the Government in condemning Bile Street has not taken any real property belonging to the appellee. Nor has it taken the company's franchise.[5] The Government has at most frustrated the license, permit, or contract—call it what one will—which the county had granted to the appellee. The Government, for reasons now to be stated, submits that such losses are not compensable.

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[5] In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893) where the Government continued to operate locks which the company placed in the Monongahela River pursuant to its franchise, it was thought that the Government had taken the franchise. Cf. *Puget Sound Power & Light Co.* v. *Puyallup*, 51 F. 2d 688 (C. C. A. 9, 1931). In the instant case, if the Government had gone into the utility business and supplied defense workers with electricity by means of appellee's lines and poles in Bile Street, it might be argued on the basis of the *Monongahela* case that the Government had appropriated the franchise and that compensation was due therefor. Such is not this case. The lines and poles are not being used by the United States; they have been completely removed. Furthermore, the correctness of the *Monongahela* case on this point is open to question. The Supreme Court has several times made it plain that the *Monongahela* decision rests on estoppel principles, the original locks having been constructed by the private company there involved at the invitation of Congress (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281 (1943); *Omnia Co.* v. *United States*, 261 U. S. 502, 513–514). Ordinarily when the Government condemns a going business "lock, stock and barrel," it does not take the corporate franchise or charter. So far as the federal taking is concerned, the company can move elsewhere and commence anew. The federal Government is not dependent upon local franchises when it chooses to exercise its federal powers within the limits of a particular state, and therefore has no need of the franchise (*Oklahoma City* v. *Saunders*, 94 F. 2d 323 (C. C. A. 10, 1938)).

II

Consequential damages including losses resulting from the frustration of private contracts are not compensable under the Fifth Amendment

The amount of compensation to which appellee is entitled is determined by the requirement of the Fifth Amendment that just compensation be paid for private property *taken* for public use. What is just compensation is a federal matter (*United States* v. *Miller,* 317 U. S. 369, 379–380 (1943)). Generally recovery has been limited in the federal courts to the fair cash market value of the property actually taken (*United States* v. *Miller,* 317 U. S. 369, 374 (1943)). While the statement has sometimes been made that the owner is entitled to be put in as good a position pecuniarily as if his property had not been taken,[6] this does not mean that all losses suffered by the owner are compensable under the Fifth Amendment (*United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 285 (1943). As Mr. Justice Brewer pointed out in *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312, 326 (1893)):

> * * * just compensation * * * is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent *for the property taken.*

[6] E. g., *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304 (1923).

The United States is required to "pay only for what it takes, not for opportunities which the owner may lose" (*United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 282 (1943)). "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment" (p. 281). "Injury to a business carried on upon lands taken for public use * * * does not constitute an element of just compensation" (*Joslin Co.* v. *Providence,* 262 U. S. 668, 675 (1923)). Thus, in *Mitchell* v. *United States,* 267 U. S. 341, 345 (1925), the owner was denied compensation for the destruction of his business which resulted in the taking of his land for a public project even though the business could not be reestablished elsewhere. "If the business was destroyed, the destruction was an unintended incident of the taking of the land" (p. 345). Similarly, and for substantially the same reasons, a utility's loss of customers through the Government's taking and vacating the customer's property which was serviced by the utility is not compensable (*Deepe* v. *United States,* 103 Colo. 294, 86 P. 2d 242 (1938) (telephone company); *Fix* v. *City of Tacoma,* 171 Wash. 196, 17 P. 2d 599 (water company)). Analogously no compensation can be awarded for the cost of readjusting an irrigation service by inclusion of new land in the same amount as that condemned and construction of new ditches in order to continue the service in conditions similar to those prior to the taking (*People of Puerto Rico on behalf of the Isabela Irrigation Service* v. *United States,* 134 F. 2d 267 (C. C. A. 1,

1943), certiorari denied October 11, 1943). Likewise, a mere interference with private contract rights involving property taken are not compensable although resulting in a pecuniary loss to the owner. "Frustration and appropriation are essentially different things" (*Omnia Co.* v. *United States,* 261 U. S. 502, 508–513 (1923); *Mullen Benevolent Corporation* v. *United States,* 290 U. S. 89 (1933); *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 282 (1943)). And it will be recalled that the owner in the *Miller* case was not left in as good a position pecuniarily as if his property had not been taken since he was not permitted to recover the increment in value caused by the government project, an increment enjoyed by his neighbors whose lands were not taken.

Among the losses most frequently held to be noncompensable is the removal and relocation expenses incurred by the owner in moving personal property or a business from the premises condemned and reestablishing it elsewhere (*Joslin Co.* v. *Providence,* 262 U. S. 668, 675–676 (1923); *Potomac Electric Power Co.* v. *United States,* 85 F. 2d 243, 249 (App. D. C. 1936), certiorari denied 299 U. S. 565 (1936); *Futrovsky* v. *United States,* 66 F. 2d 215, 216–217 (App. D. C. 1933); cf. *Mitchell* v. *United States,* 267 U. S. 341, 345 (1925); *Bothwell* v. *United States,* 254 U. S. 231 (1920)).

Likewise, attempts by a lessee to recover removal and relocation expenses in condemnation proceedings have been rejected repeatedly by the courts (*Gershon Bros. Co.* v. *United States,* 284 Fed. 849 (C. C. A. 5,

1922); *United States* v. *Meyers,* 190 Fed. 688 (Conn. 1911); *County of Los Angeles* v. *Signal R. Co.,* 86 Cal. App. 704, 710–712, 261 Pac. 536 (1927); *Mayor & C. C. of Balto.* v. *Gamse,* 132 Md. 290, 296–297, 104 Atl. 429 (1918); *Springfield S. W. R. Co.* v. *Schweitzer,* 173 Mo. App. 650, 655, 158 S. W. 1058 (1913); *St. Louis* v. *St. Louis I. M. & S. R. Co.,* 266 Mo. 694, 707, 182 S. W. 750 (1916); *Ranlet* v. *Railroad,* 62 N. H. 561, 564 (1883); *Matter of New York W. S. & B. R. Co.,* 35 Hun. 633 (N. Y. 1885); *Fiorini* v. *Kenosha,* 208 Wis. 496, 499, 243 N. W. 761 (1932); but see *General Motors* v. *United States* (C. C. A. 7, decided February 11, 1944). Such damages like other consequential damages have no bearing upon the value of the property taken. In short, the condemnee is made pecuniarily whole when he is paid the fair market value of the property taken.

It is true that a number of state constitutions and statutes provide that property shall neither be taken nor *damaged* without compensation. Among these are Washington, which permits the landowner to recover damages for the interruption of his business or injuries thereto. (Wash. Const., Art. I, sec. 16; *Great Northern Railway Co.* v. *Seattle,* 180 Wash. 368, 39 P. 2d 999 (1935); cf. *Seattle* v. *Columbia & Puget Sound R. R. Co.,* 6 Wash. 379, 390, 393, 33 Pac. 1048 (1893); *Belleville* v. *St. Clair County Turnpike Co.,* 234 Ill. 428, 84 N. E. 1049 (1908)). But the Fifth Amendment, as we have seen (*supra,* pp. 12–13), has never been so enlarged. (*Mitchell* v. *United States,* 267 U. S. 341, 345–346 (1925); *Futrovsky* v. *United States,* 66 F. 2d 215, 217 (App. D. C. 1933)). And

any state rule of damages, evidentiary or otherwise, which would increase the compensation provided for by the Federal Constitution is in no way applicable in a federal condemnation proceeding (*United States* v. *Miller,* 317 U. S. 369, 379–380 (1943); *United States* v. *Alcorn,* 80 F. 2d 487, 489 (C. C. A. 9, 1936); *United States* v. *251.81 acres of land in Meade County, Ky.,* 50 F. Supp. 81 (W. D. Ky. 1943); *United States* v. *Indian Creek Marble Co.,* 40 F. Supp. 811, 818, 819 (E. D. Tenn. 1941); *United States* v. *Crary,* 2 F. Supp. 870 (W. D. Va. 1932)). There being no statutory mandate by Congress to the contrary, the federal government pays "only for what it takes," and not for business losses which the condemnee may suffer by reason of frustrated contracts, the necessity of reestablishing his business elsewhere, etc. (*United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 282 (1943)).

In the instant case the district court correctly applied the foregoing principles in disallowing items (b) and (c). These same principles likewise require the disallowance of item (d). As we have seen (*supra,* p. 7), appellee had no property rights in Bile Street itself. By virtue of its franchise from King County it had simply a contract right to maintain its lines and poles in the street so long as the street remained a public thoroughfare. When the Government condemned the area in question, it frustrated the continued exercise of that contract right. Scores of similar situations may be readily envisaged. For example, a coal mining company may contract to supply a manufacturer with a specified quantity of coal

annually. The Government requisitions or condemns the coal mine. The manufacturer's contract right is frustrated but not appropriated by the Government (*Omnia Co.* v. *United States,* 261 U. S. 502 (1923)). The manufacturer may have to pay more for coal from some other company but he has no claim against the Government. What right, if any, he may have against the coal company will depend upon the terms of his contract. Similarly, the Government may condemn a power company or requisition its entire output of electrical energy for war plants. Contracts with other customers are thus frustrated but these customers are not entitled to recover any compensation from the United States for attendant losses. Finally, a school, irrigation or reclamation district may issue bonds to provide improvements, the bonds to be payable by assessments to be levied for the next twenty years against lands within the district. The Government condemns all lands within the district for an air base or other public purpose, the lands thus becoming nontaxable. The bondholders, except to the extent that their bonds have become actual liens against the land, have no recourse against the United States (*Mullen Benevolent Co.* v. *United States,* 290 U. S. 89 (1933); *People of Puerto Rico on behalf of the Isabela Irrigation Service* v. *United States,* 134 F. 2d 267 (C. C. A. 1, 1943), certiorari denied October 11, 1943).

Those cases present a situation analogous to that here involved. The bondholders in the *Mullen Benevolent* case had no property rights in the land there condemned; the company here had no property rights

in Bile Street itself. The bondholders were depending on certain lands remaining in private ownership so as to supply the revenues to satisfy the bonds; the company here was depending on the continued retention by King County of a highway easement in Bile Street. In both instances the condemnation by the United States frustrated contractual arrangements. The damages thus suffered were consequential and not compensable in the *Mullen Benevolent* case. They are likewise not compensable here. "The streets were public streets * * * and loss sustained by their closing is consequential" (*Mt. Vernon A. & W. Ry. Co.* v. *United States,* 75 C. Cls. 704, 708 (1932)).

Nor can damages be recovered on any severance theory inasmuch as appellee had no property rights in Bile Street. Severance damages are not recoverable when the injury claimed grows out of a frustration of intangible rights which does not involve the taking of physical property. Even "as respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages" (*United States* v. *Miller,* 317 U. S. 369, 376 (1943); cf. *Sharpe* v. *United States,* 112 Fed. 893 (C. C. A. 3, 1902), affirmed 191 U. S. 341 (1903)).

The rule allowing recovery of compensation for severence damages cannot be made applicable to the facts in the present case. None of the power company's physical property was taken. It merely had to remove its poles and lines (personalty) from the privately owned lands and the public highways within

the project area (R. 33–34). The claim here in controversy did not arise out of the taking of the power company's easement over privately owned land (R. 28) for which judgment in the sum of $73.00 has been entered (R. 39), and from which no appeal has been taken. The claim here in controversy arose out of the frustration of the power company's franchise to share in the use of the public highway easement. The only physical item "severed" in this connection was not the power company's physical property but its customer. Loss of customers, however, resulting from proper exercise of the power of eminent domain is consequential damage which is not compensable (*Deepe* v. *United States,* 103 Colo. 294, 86 F. 2d 242 (1938); *Fix* v. *City of Tacoma,* 171 Wash. 196, 17 P. 2d 599 (1933)). Loss of future profit or earning power in a business even from a taking by condemnation of some of the physical property used in the business, if without other showing of injury to the physical property retained, does not bring the case within the rule of severance damages (*Mitchell* v. *United States,* 267 U. S. 341, 343, 345 (1925); *New York & Baltimore Trans. Line* v. *United States,* 67 C. Cls. 491, 505 (1929); *United States* v. *Inlots,* 26 Fed. Cas. 490, 496, Cas. No. 14,441a (S. D. Ohio, 1873); *Kennebec Water District* v. *Waterville,* 97 Me. 185, 212, 54 Atl. 6 (1902); *Oakland* v. *Pacific Coast Lumber & Mill Co.,* 171 Calif. 392, 153 Pac. 705, 707 (1915)).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the district court erred in awarding the ap-

pellee $408.98, together with interest, for the expenses which it incurred in rebuilding a transmission line which it formerly operated on Bile Street under a franchise from King County. Any allowance for such expenditures should be stricken from the judgment, and the judgment as so modified should be affirmed.

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